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Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

October Term, 2004

GARY McDOWELL and ROSELEA McDOWELL,
Petitioners,

v.

PROVIDENCE HEALTH CARE PLAN,
an Oregon non-profit corporation,
Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW
[SCR 14(a)]

1. Is an ERISA-fiduciary's state law claim against an ERISA-plan member for reimbursement filed in state court, which claim is based on the express language of the ERISA plan, completely preempted and removable to federal court?

2. Did this Court in *Great West Life & Annuity Ins. Co. v. Knudson*, 524 US 204, 122 SCt 708, 151 LEd2d 635 (2002), intend to leave open the door for ERISA plan fiduciaries to sue plan members in state court to enforce a reimbursement provision of an ERISA plan?

PARTIES TO THE PROCEEDING

CORPORATE DISCLOSURE STATEMENT

[SCR 14(b)]

The caption contains the names of all the parties. Defendants Gary and Roselea McDowell below are petitioners herein, and therefore no corporate disclosure statement is required of them.

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[SCR 14(c)]

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IN THE
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GARY McDOWELL and ROSELEA McDOWELL,
Petitioners,
v.
PROVIDENCE HEALTH CARE PLAN,
an Oregon non-profit corporation,
Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

I. CITATIONS TO DECISIONS BELOW
[SCR 14(d)]

The Ninth Circuit's amended opinion was issued on October 1, 2004. The official citation is 385 F3d 1168. In addition, on that same date, the Ninth Circuit entered an order denying defendants McDowells' petition for rehearing or hearing *en banc*, and seven judges (six active and one senior) filed a dissenting opinion from the order denying the petition. The Ninth Circuit's original opinion was filed on March 24, 2004. The official citation is 361 F3d 1243. The Ninth Circuit's opinions were issued in consolidated appeals filed by Providence Health Care from two adverse judgments of the United States District Court for the District of Oregon in case numbers 01-1704-JE (hereinafter, "*McDowell I*") and 02-6110-TC ("*McDowell II*"). Neither district court opinion was published (but each is included in the appendix hereto).

II. BASIS FOR JURISDICTION

[SCR 14(e)]

The amended opinion of the Ninth Circuit, the order denying defendants McDowells' petition for rehearing or hearing *en banc*, and the dissenting opinion from the order denying defendants McDowells' petition, were entered on October 1, 2004. This court has jurisdiction to review the Ninth Circuit's decision pursuant to 28 USC § 1254.

III. STATUTES AT ISSUE

[SCR 14(8)]

This case involves the application of certain provisions of ERISA, 29 USC §§ 1001 et seq. Specifically, parts of 29 USC §§ 1132 and 1144 are applicable. 29 USC § 1132(a)(3) provides:

> A civil action may be brought
>
> ...
>
> by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

29 USC § 1144(a) provides:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title. This section shall take effect on January 1, 1975.

29 USC § 1144(c)(1) provides:

> ... The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

IV. STATEMENT OF THE CASE

A. Basis of Jurisdiction in the Court of First Instance [SCR 14(g)(ii)]

1. **USDC Case No. 01-1704 JE ("*McDowell I*"):** On October 18, 2001, plaintiff Providence filed a claim in state court for breach of contract. Complaint, App: G-1-6. Defendants McDowell removed the claim to the district court for the district of Oregon pursuant to 28 USC § 1441(a). Providence moved to remand, and defendants McDowells moved to dismiss. Providence's motion to remand was denied, and defendants McDowells' motion to dismiss was granted because Providence's claim was preempted by

ERISA. Opinion and Order, App: E-1-7.[1] The district court had exclusive original jurisdiction of an ERISA claim under 29 USC § 1132(e).

2. **USDC Case No. 02-6110-TC ("*McDowell II*"):** After Providence's claim in *McDowell I* was dismissed, on April 12, 2002, Providence filed a complaint asserting a claim under 29 USC § 1132(a)(3) for reimbursement in the district court for the district of Oregon. Complaint, App: H-1-7. Defendants McDowell moved to dismiss Providence's claim under 29 USC §1132(a)(3) based on this Court's decision in *Great-West Life & Annuity Ins. Co. v. Knudson*, *infra*, and Providence moved for summary judgment. Defendants McDowells' motion to dismiss was granted, and Providence's motion was denied. Order, App: F-1-7. The district court had exclusive original jurisdiction of an ERISA claim under 29 USC § 1132 (a).

3. **Ninth Circuit Case Nos. 02-35263 and 02-35841:** Providence filed appeals in the Ninth Circuit from the adverse district court judgments under 28 USC § 1291. The Ninth Circuit consolidated the two appeals.

B. Statement of Material Facts and Proceedings Below [SCR 14(g)]

1. Statement of Facts

In February 2000, the McDowells were severely injured in a car accident by a third party in the State of Washington and had to be treated for their injuries.

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[1] Defendants McDowell contended that any alleged state law claim was completely pre-empted under 29 USC §1144(a).

Complaint in *McDowell I*, App: G-2. The McDowells first exhausted their personal injury protection (PIP) benefits under their auto policy, and then submitted their remaining medical expenses for payment under the terms of Providence's group health plan (issued to Mr. McDowell's employer). Affidavit of Gary McDowell, p. 2, Clerk's Record ("CR") #16.[2] In February 2001, the McDowells settled their third-party personal injury claims. At that time, Providence asserted a right to reimbursement under the plan for "$21,727.55" for medical bills paid. Complaint in *McDowell I*, App: G-3-4. The McDowells made an offer in compromise, but Providence rejected it and demanded payment in full. Complaint in *McDowell I*, App: G-4; McDowell Aff., p. 2, CR:16. Providence thereafter filed its first action, *McDowell I*, in state court for breach of contract, and later the second action, *McDowell II*, in federal district court. Complaint in *McDowell I*, App: G-1-6; Complaint in *McDowell II*, App: H-1-7.

Providence is a health care service contractor which issued a group health plan to defendant Gary McDowell's employer, Wah Chang. Complaint in *McDowell I*, App: G-1-2. Prior to Providence, Wah Chang contracted with a

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[2] Providence initially refused to pay any medical bills unless the McDowells signed "trust" agreements. McDowell Aff, p. 2, CR:16. The district court held that the trust agreements (or "directives," as the district court described them) were not enforceable because, *inter alia*, they lacked consideration since Providence was already obligated to pay benefits. Opinion and Order, footnote 1, App: E-3. Providence did not assign error to, or challenge, the district court's ruling in that regard. Providence's Opening Brief in the Ninth Circuit.

company called SelectCare Health Plans to provide medical benefits for its employees. Complaint in *McDowell I*, App: G-2. Providence apparently acquired SelectCare Health Plans, and then unilaterally issued its own form of plan to Wah Chang. Complaint in *McDowell I*, App: G-2. Providence did not request, nor did the McDowells sign, a form of application for coverage under Providence's plan. McDowell Aff., p.2, CR:16.

Plaintiff Providence is an ERISA-plan fiduciary, and its plan is governed by ERISA. Complaint in *McDowell II*, App: H-1-2. Gary McDowell, as an employee of Wah Chang, is a plan participant, and his wife, Roselea McDowell, is a plan beneficiary. Complaint in *McDowell I*, App: G-2, Complaint in *McDowell II*, App: H-2. The McDowells did not participate in any negotiations (if any occurred) about the terms of the group health plan, and there is no evidence that Wah Chang negotiated any terms of the plan (and certainly not the reimbursement terms labeled "Third Party Liability/ Subrogation"). The McDowells are third party beneficiaries of the group health plan. *Fireman's Ins. v. Motors Ins.*, 245 Or 601, 604-605, 423 P2d 754 (1966) (a contract of insurance is a third party beneficiary contract "if it appears... that the purpose of the person securing the insurance was to benefit, at least in part, someone in addition to, or other than, himself"). The reimbursement term of the plan provides:

> 11.2 Proceeds of Settlement or Recovery. **Providence Health Plan** shall be entitled to the proceeds of any settlement, whether or not responsibility is accepted or denied by the third party for the condition, or any judgment that results in a recovery from a third party, up to the amount of benefits paid by **Providence Health Plan** for the condition, less a proportionate share of reasonable attorney fees, whether such benefits are paid by **Providence Health Plan** before or after the settlement or recovery. Prior to accepting any settlement, the Member shall notify **Providence Health Plan** in writing of any terms or conditions offered in settlement, and shall notify the third party of **Providence Health Plan's** interest in the settlement established by this provision. Group Health Plan, paragraph 11.2, p.42, Exhibit 2 to Providence's Complaint, CR:2.

2. Statement of Proceedings

Providence appealed from two adverse district court decisions in actions Providence filed consecutively against Gary and Roselea McDowell for reimbursement of amounts paid for their medical expenses. In *McDowell I*, Providence brought a claim for reimbursement in state court based on paragraph 11.2 of the plan (quoted above). The McDowells removed *McDowell I* to federal court, and moved to dismiss Providence's claims on the ground that ERISA preempted Providence's claim. Providence moved to remand. The district court denied Providence's motion to remand, and granted the McDowells' motion to dismiss. District Court

Opinion and Order, App: E-1-7. After *McDowell I* was dismissed, Providence filed *McDowell II* in federal court and asked for "equitable relief" under § 1132 for reimbursement of amounts paid, relying on the same reimbursement language in the plan. The district court in *McDowell II* held that Providence's claim for "equitable relief" was merely a disguised action for monetary damages, and dismissed *McDowell II* pursuant to *Great West Life & Annuity Ins. Co. v. Knudson*, 534 US 204, 122 S Ct 708, 151 LEd2d 635 (2002). District Court Order, App: F-1-7.

The Ninth Circuit panel affirmed the decision in *McDowell II*, but the panel reversed the decision in *McDowell I*, and remanded the case to state court. 385 F2d 1168, App: A-1-13.

V. REASONS WHY THIS COURT SHOULD GRANT CERTIORARI

The panel's decision in *Providence Health Plan v. McDowell*, 361 F3d 1243 (9th Cir 2004), as amended, 385 F3d 1168 (9th Cir. 2004), is a decision in the two consolidated appeals, *McDowell I* and *McDowell II*. Petitioner does not take issue with the panel's decision in *McDowell II*. Petitioner does take issue with the decision in *McDowell I*. Petitioner requests that this court grant certiorari in respect of *McDowell I*. The reasons are stated below.

Question No. 1

First, ERISA established a uniform system of federal laws to govern health care and pension benefit plans. The panel concluded that Providence's alleged "state law" claim

for reimbursement was not preempted and did not fall within the scope of ERISA's civil enforcement provision, 29 USC § 1132 (hereinafter, "§ 1132"). That decision conflicts with the Supreme Court's decision in *Pilot Life Ins. Co. v. Dedeaux*,481 US 41, 107 S Ct 1549, 95 L Ed 2d 39 (1987), and decisions of the circuits, namely:

1. *Cement Masons Health and Welfare Trust Fund v. Stone*, 197 F3d 1103 (9th Cir 1999);
2. *FMC Medical Plan v. Owens*, 122 F3d 1258 (9th Cir 1997);
3. *Honolulu Joint App. & Train. Comm. v. Local Union No. 675*, 332 F3d 1234 (9th Cir 2003);
4. *Pacificare v. Martin*, 34 F3d 834 (9th Cir 1994);
5. *Reynolds Metals v. Ellis*, 202 F3d 1246 (9th Cir 2000);
6. *Westaff v. Arce*, 298 F3d 1164 (9th Cir 2002);
7. *Cooperative Benefit Adm. v. Ogden*, 367 F3d 323 (5th Cir 2004);
8. *Bauhaus v. Copeland*, 292 F3d 439 (5th Cir 2002);
9. *Qualchoice, Inc. v. Rowland*, 367 F3d 638 (6th Cir 2004);
10. *Community Health Plan v. Mosser*, 347 F3d 619 (6th Cir 2003);
11. *Primax Recoveries v. Sevilla*, 324 F3d 544 (7th Cir 2003).

These circuit cases hold that an action by a plan fiduciary for reimbursement is preempted and precluded.[3] As a result, this case presents questions of exceptional importance because the decision threatens to undermine Congress' intent to create a uniform scheme of remedies governing enforcement of ERISA's plans.

In addition, the panel's decision conflicts with *Great West Life & Annuity Ins. Co. v. Knudson*, 524 US 204, 122 SCt 708, 151 LEd2d 635 (2002). In that case, this Court held that a fiduciary's claim for reimbursement, which the fiduciary attempted to characterize as an "equitable claim," was a legal claim for breach of contract, and was foreclosed by ERISA. In so doing, this Court reaffirmed its holding in *Mertens v. Hewitt Assoc.*, 508 US 248, 113 SCt 2063, 124 LEd2d 161 (1993), and stated that while Congress had authorized a participant or beneficiary to enforce rights under the plan, whether the relief sought was legal or equitable, Congress had not extended the same authorization to fiduciaries, but rather had provided that fiduciaries have claims for equitable relief only. *Great West*, 534 US 220-221. In response to plaintiff's contention in *Mertens* that such a construction left plaintiff with less protection than existed before ERISA, this court stated that "vague notions of a statute's 'basic purpose' are nonetheless inadequate to

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[3] In three of the cases, *FMC Medical Plan v. Owens, Cement Masons Health and Welfare Trust fund v. Stone,* and *Westaff v. Arce*, the plan brought an action on the plan and on agreements which the plan forced the members to sign, as the plan did in the instant case, after the member was injured and before the plan would pay benefits.

overcome the words of its text regarding the *specific* issue under consideration." *Mertens*, 508 US 261. The panel's decision in *McDowell I* is even inconsistent with its decision in *McDowell II*, because in both cases Providence was acting in the same role; i.e., as a fiduciary. And, since Providence is a plan fiduciary, ERISA dictates the types of claims Providence may bring against a plan participant or beneficiary. These are set forth in §1132(a), and a claim for legal relief is not one of them. *Great-West v. Knudson*, *supra*.[4]

Further, more recently, this Court unanimously decided *Aetna Health, Inc. v. Davila*, ___ US ___, 124 SCt 2488, 159 LEd2d 312 (2004), reaffirming its earlier decision in *Pilot Life Ins. Co. v. Dedeaux* 481 US 41, 107 SCt 1549, 95 LEd2d 39 (1987). In *Davila*, this Court rejected any attempt by state law to supplement the civil enforcement scheme of 29 USC §1132. In reversing the Fifth Circuit, the Supreme Court stated that any attempt to distinguish preempted from non-preempted claims based on a particular label affixed to the claims ("contract" v. "tort") would "elevate form over substance and allow parties to evade" the preemptive scope of ERISA. 124 SCt 2498. The panel in *McDowell* did not even mention *Davila*, even though this

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[4] In *McDowell I*, the panel held that Providence's legal claim for breach of an express reimbursement clause in the policy is not related to the plan. In *McDowell II*, the panel held that a claim on the plan for equitable relief (specific performance) was preempted and precluded by ERISA. If the latter claim is governed by ERISA, then, *a priori*, the claim must relate to the plan (otherwise, ERISA would not apply). There is no way to reconcile the panel's conflicting logic in the two appeals.

Court decided *Davila* before the panel amended its opinion and filed it on October 1, 2004. The panel's amended opinion conflicts with this Court's holding in *Davila*.

Second, the panel's decision in *McDowell I* conflicts with the Supreme Court's decision in *Metropolitan Life Ins. Co. v. Taylor*, 481 US 58, 107 S Ct 1542, 95 LEd2d 55 (1987), and the decisions of several circuit courts, namely:

1. *Clorox v. US Dist Ct for N.D. of Cal.*, 779 F2d 517 (9th Cir 1985);
2. *Engelhardt v. Paul Revere Life Ins. Co.*, 139 F3d 1346 (11th Cir 1998);
3. *Jass v. Prudential Health Care Plan, Ins.*, 88 F3d 1482 (7th Cir 1996);
4. *McCoy v. Mass. Inst. of Tech.*, 950 F2d 13 (1st Cir 1991);
5. *Shea v. Esensten*, 107 F3d 625 (8th Cir 1997).

These cases hold that an action filed in state court to enforce the terms of an ERISA plan is completely preempted by federal law, and is therefore removable.

Question No. 2.

The panel apparently believed that this Court left open in *Great West* the question of whether a fiduciary could sue a plan member for reimbursement. Petitioners do not believe this Court left that door open but, rather, left the door open for a fiduciary to sue a third party. Nevertheless, petitioner requests that this Court resolve this issue once and for all.

VI. ARGUMENT

Introduction

The panel held in *McDowell I* that the district court lacked removal jurisdiction because Providence's claim for reimbursement was not preempted under § 1144 and did not fall within the scope of § 1132(a). 385 F3d 1173, App: A-11. The panel then directed the district court to remand *McDowell I* to state court. The panel's decision is contrary to the law.

The result in this case should be dictated by the language of ERISA. 29 USC § 1144(a) provides that, with exceptions not here applicable, ERISA shall "supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan . . ." 29 USC § 1132(a)(3) provides that a civil action may be brought by a fiduciary:

> (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter or the terms of the plan;

29 USC § 1132(e) provides that the district courts shall have **exclusive** jurisdiction of actions brought by a fiduciary. Thus, a fiduciary may bring a civil action to enforce the terms of a plan only under 29 USC § 1132(a)(3), and that section permits an action only if it is equitable. 29 USC § 1132(a)(3) does not permit Providence to bring a claim against the McDowells for reimbursement.

A. Providence's Claim for Breach of Contract Is Completely Preempted by ERISA and Removable (Question No. 1)

1. Providence's Claim Relates to the Health Care Plan

Pursuant to 29 USC § 1144(a), ERISA supersedes state laws that relate to an employee benefit plan governed by ERISA. 29 USC § 1144 (c) (1) defines state laws to include laws, decisions, rules, regulations or other *state action* having the effect of law. In *Pilot Life Ins. Co. v. Dedeaux*, 481 US 41, 107 S Ct 1549, 95 L Ed 2d 39 (1987), this Court held that state causes of action by an employee against a plan-insurer for improper processing of a disability claim were preempted because the causes of action *related to the plan*[5], even though the employee was left without his state law remedies because § 1132 did not authorize them. 481 US 52-57. This Court held the phrase "relate to" should be given its broad, common sense meaning so that a state law "relates" to a benefit plan if it has a connection with or reference to such a plan. 481 US 47:

> The deliberate care with which ERISA's civil enforcement remedies were drafted and the balancing of policies embodied in its choice of remedies argue strongly for the conclusion that **ERISA's civil enforcement remedies**

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[5] Notably, the panel decision makes no mention of *Pilot Life*. *Pilot Life* is still good law, and was limited by the recent case of *Kentucky Association of Health Plans v. Miller*, 538 US 329, 123SCt 1471, 155 LE2d 468(2003), only to the extent that *Pilot Life* relied on the McCarran-Ferguson factors in defining the "business of insurance".

> **were intended to be exclusive**... The legislative history demonstrates that the preemptive force of § 502(a) was modeled after § 301 of LMRA. (emphasis added) 481 US 54[6].

The Ninth Circuit followed *Pilot Life Ins. Co.* in *Bast v. Prudential Ins. Co.,* 150 F3d 1003 (9th Cir 1998), where the appeals court held that an employee's claims against a plan administrator for bad faith and breach of fiduciary duty for failing to authorize benefits under a plan were preempted because §1132 would be undermined if litigants could invoke state remedies which Congress rejected, even if litigants are left without a remedy. 150 F3d 1007, 1009-1010. The Ninth Circuit held that the key issue was whether the parties' relationship was ERISA-governed:

> We agree with our sister circuits that ERISA preempts state law claims, even if the result is that a claimant, relegated to asserting a claim only under ERISA, is left without a remedy. The focus is on ERISA. If it does not provide a remedy, none exists. 150 F3d 1010.

The panel below relied instead on *New York State Conference of BlueCross & BlueShield Plans v. Travelers Ins. Co.,* 514 US 645, 115 S Ct 1671, 131 L Ed2d 695 (1995), to support its conclusion that Providence's claim did not relate to the plan. In that latter case, this Court held that state laws were not preempted which required hospitals to

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[6] This Court in *Pilot Life* relied on language from *Massachusetts Mutual life Insurance Co. v. Russell*, 473 US 134, 146, 87 L Ed 2d 96, 105 S Ct 3085 (1985), to the effect that Congress did not intend to authorize remedies other than those enumerated in §1132.

collect surcharges from patients insured by insurers and HMOs other than Blue Cross and Blue Shield. This Court said that state laws with an indirect economic effect on a plan did not "relate to" the plan. 514 US 659-662. Providence's state law claim for reimburse00ment in this case is not analogous to the New York surcharge law, but rather is a claim based on the express language of Providence's plan[7]. Providence's claim for reimbursement would not exist but for the express language of the plan. Providence specifically alleged in its complaint that "[u]nder the terms of paragraph 11.2 of the Group Contract [the reimbursement clause], defendants [McDowell] are obligated to repay Providence from any recovery..." Complaint in *McDowell I*, App: G-3. The panel quoted and relied on this language in its opinion. 386 F3d 1170, App: A-3. There is no common law right of reimbursement. *Milwaukie Mechanics' Ins. Co. v. Ramsey*, 76 Or 570, 576, 149 P542 (1915).[8] Providence had no right of reimbursement from its own insureds, the McDowells, in

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[7] This Court in *New York State Conference of BlueCross & BlueShield Plans v. Travelers Ins. Co.* acknowledged that ERISA preempts "state laws providing alternative enforcement mechanisms." 514 US 658. Providence's state claim for reimbursement is an alternative enforcement mechanism.

[8] An insurer has a common law right of subrogation against third-party tortfeasors after paying benefits to its insured (e.g., if an insurer pays for property destroyed by fire negligently caused by a third-party, the insurer is subrogated to the insured-owner's cause of action against the wrongdoer): *United Pacific Co. v. Schetky Equipment Co.*, 217 Or 422, 427, 342 P2d 766 (1959). But an insurer has no common law right of reimbursement from its own insured who has, after all, paid premiums for the right to receive benefits under the policy.

the absence of the plan language. Thus, when the panel states the claim does not "relate to" the plan, 386 F3d 1172, App: A-7, one must ask: Then what does it relate to? After all, Providence's claim in *McDowell I* was for breach of **contract**. Complaint, App: G-4-5. What contract? The Providence health care **plan contract**.

The panel stated "[b]ecause this is merely a claim for reimbursement based upon the third-party settlement, it does not `relate to' the plan," 386 F3d 1172, App: A-7, citing *Blue Cross of California v. Anesthesia Care*, 187 F3d 1045 (9th Cir 1999). In *Blue Cross of California*, physicians brought a lawsuit against Blue Cross for breach of physician fee agreements, and Blue Cross contended that the claims were preempted by ERISA because some patients had assigned to the physicians benefit payments due from the insurer. The Ninth Circuit held that the claims arose from the fee agreements between the physicians and Blue Cross, not agreements between Blue Cross and the patients (who were plan participants or beneficiaries), and ERISA did not govern the physicians agreements. 187 F3d 1050. In other words, the claims did not encroach on any relationship governed by ERISA. 187 F3d 1054.

In *General American Life Ins. Co. v. Castonguay*, 984 F2d 1518 (9th Cir 1993), the Ninth Circuit stated:

> The key to distinguishing between what ERISA preempts and what it does not lies, we believe, in recognizing that the statute comprehensively regulates certain relationships; for instance, the relationship between plan and plan member, between plan and

> employer, between employee and employer (to the extent an employee benefit plan is involved), and between plan and trustee (emphasis added). 984 F2d 1521.

Providence is a plan fiduciary. Providence made a claim for reimbursement against the McDowells, plan members,based on an express term of the plan. Providence's claim affects the relationship between the plan and the plan members. Its claim is therefore completely preempted.

2. Providence's Claim Falls within the Scope of § 1132

The panel also stated that Providence's claim for reimbursement "does not fall within ERISA's civil enforcement provision [§ 1132]." 386 F3d 1172, App: A-8. The panel stated "[h]ere, Providence is seeking ordinary damages-monetary relief based upon contractual remedies that arise under state law. Therefore, its claim is not within ERISA's civil enforcement provisions," citing *Abraham v. Norcal Waste System*, 265 F3d 811 (9th Cir 2001). *McDowell*, 385 F3d 1173, App: A-8. In *Abraham*, plaintiffs, former employee-shareholders, sued in state court an employee-owned company, the employee stock ownership plan, and others for conduct that occurred after a leveraged buyout. Plaintiffs alleged fraud, breach of contract, and other tort and quasi-contract claims (some plaintiffs who remained participants also brought suit in federal court alleging breach of duties imposed by ERISA). Defendants removed the state law claims to federal court. The Ninth Circuit held there was no preemption under § 1144(a) of ERISA because plaintiffs'

state law claims had nothing to do with plan benefits, or any duties imposed by ERISA. *Abraham*, 265 F3d 823-824. The Ninth Circuit in *Abraham* also noted that the financial relationship between the parties arose out of a transaction specifically exempted by ERISA (i.e., a leveraged buyout). The panel apparently believes that removal is dependent not only on Providence's claim "relating to" the plan, but also on the claim's "falling within the scope of § 1132." At page 1171, App: A-5, the panel cites *Metropolitan Life Ins. Co. v. Taylor*, 481 US 58, 107 SCt 1542, 95 LEd 2d 55 (1987), but the panel did not follow that decision. In *Metropolitan Life Ins. Co. v. Taylor*, an employee filed an action in state court against his employer and the ERISA insurer alleging common law contract and tort claims for failure to pay benefits, and defendants removed the action. This Court held that the action was properly removed because state causes of action for benefits "related to" the plan and were preempted. 481 US 62. Although plaintiff in *Taylor* took the position that the complaint asserted state law causes of action, this Court held the causes were necessarily federal in character, and were removable in spite of the "well-pleaded complaint" rule. 481 US 67.[9] This Court held in *Taylor* that when Congress enacted ERISA, Congress intended to convert all

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[9] The panel in *McDowell* also cited *Toumajian v. Frailey*, 135 F3d 648 (9th Cir 1998) to support its position. *McDowell*, 386 F3d 1171. *Toumajian* was an action by a client against his accountants for negligence in establishing a plan. On the facts of that case, the Ninth Circuit held that the client's malpractice action did not fall within the scope of § 1132 (and the case was not removable) because the client was not seeking to enforce a plan. 135 F3d 655-656.

state law causes of action into federal causes. 481 US 65.[10] Finally, this Court in *Taylor* held that state law causes of action for benefits were within the scope of § 1132, and must yield to the exclusive federal remedies set forth in that section. 481 US 62-63, 66. This Court did not state that removal was proper only if plaintiff's claim "fell within the scope" of § 1132. Rather, the Court held that claims relating to the plan **necessarily** fall within the scope of § 1132.[11] This Court in *Metropolitan Life Ins. Co. v. Taylor* did not discuss § 1132's "scope" as an additional requirement for removal. Rather, this Court in *Metropolitan Life Ins. Co. v. Taylor*, and in *Pilot Life*, discussed § 1132's exclusivity as additional proof that Congress intended that § 1132 displace all state law claims relating to a plan. *Pilot Life*, 481 US 52-57; *Metropolitan Life Ins. Co. v. Taylor*, 481US 66. In any event, the lesson of *Pilot Life* and *Metropolitan Life Ins. Co. v. Taylor* (which were both decided by this Court on the same day) is that any claim to enforce the plan falls within the scope of § 1132, which is the exclusive means of enforcing a plan. If § 1132 does not authorize Providence's claim in this case (and it does not), then no claim exists.

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[10] *Note Bene*: If this Court found that a tort claim relating to a plan was removable, then, *a fortiori,* a claim for breach of an express provision in the plan document would certainly be removable.

[11] In *Metropolitan Life Ins. Co. v. Taylor*, this Court relied on *Avco Corp. v. Machinists*, 390 US 557, 20 L Ed 2d 126, 88 S Ct 1235 (1968). *Taylor*, 481 US 64. *Avco Corp.* established the principle that the preemptive force of § 301 of the Labor Management Relations Act was so powerful that it displaces entirely any state causes of action for violation of collective bargaining agreements, and that any such causes of action are purely a creature of federal law.

B. This Court Did Not in *Great West* Contemplate That a Fiduciary Could Bring a State Law Claim for Reimbursement in State Court (Question No. 2)

The panel contends that this Court left open in *Great West* the question of whether a fiduciary's direct action asserting a state law claim for reimbursement against a plan member would be preempted. *McDowell*, 385 F3d 1173, App: A-8. While this Court may have left open the question of whether a fiduciary may bring an action in state court against a third-party tortfeasor, the McDowells do not believe that this Court contemplated that a fiduciary could make a state law claim against a plan member for legal damages.

The panel in *McDowell* recognizes that fiduciaries such as Providence could not invoke ERISA's equitable remedies to obtain reimbursement from their plan participants and beneficiaries, citing *FMC Medical Plan v. Owens*, 122 F3d 1258 (9th Cir 1997) and *Cement Masons Health & Welfare Trust Fund v. Stone*, 197 F3d 1003 (9th Cir 1999). *McDowell,* 385 F3d 1173, App: A-9.[12] But, the

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[12] The panel also relies on a 1997 footnote in *Owens* that stated:

> FMC [a plan fiduciary] will have to pursue its claims under the Plans in state court if it wishes to receive the reimbursement it is allegedly owed by Owens [a plan participant].

122 F3d 1262, n. 2. The quoted language appears on the same page as the conclusion in Owens that the district court was without subject matter jurisdiction. The footnote was dictum and appended to language subsequently disapproved by the Ninth Circuit two years later in *Cement Masons*, where the Ninth Circuit held that dismissal of a claim for reimbursement was a dismissal on the *merits*, not for want of subject matter jurisdiction. *Cement Masons*,

panel then relies on the holdings of *Cement Masons* and *Owens* to support its view that Providence can bring a state law claim for reimbursement. The fact that § 1132 does not authorize an equitable claim for reimbursement does not mean it authorizes a legal claim for reimbursement.[13] On the contrary, in *FMC Medical Plan v. Owens*, *supra*, *Cement Masons Health and Welfare Trust Fund v. Stone*, *supra*, *Reynolds Metals v. Ellis*, 202 F3d 1246 (9th Cir 2000), *Honolulu Joint App. & Train. Comm. v. Local Union No. 675*, 332 F3d 1234, 1237-1238 (9th Cir 2003), and *Westaff v. Arce*, 298 F3d 1164 (9th Cir 2002), the Ninth Circuit consistently held that actions brought by plan fiduciaries against plan beneficiaries (or participants) for reimbursement were preempted and precluded by ERISA. Only ten years ago, the Ninth Circuit held that a legal claim for reimbursement against a participant would not lie. *Pacific Care v. Martin*, 34 F3d 834, 837-838 (9th Cir 1994). The panel did not discuss this case or attempt to distinguish it. In *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 US 204, 122 S Ct 708, 151 LEd2d 635 (2002), a case also arising out of the Ninth Circuit, Great-West, attempted to avoid the Ninth Circuit precedent by recharacterizing its breach of contract claim as an equitable claim under ERISA. This Court correctly closed that door.

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197 F3d 1008. The case of *Westaff v. Arce*, 298 F3d 1164 (9th Cir 2002), decided after *Cement Masons*, supports the holding of *Cement Masons*. See, *Westaff*, 298 F3d 1167.

[13] This was the argument that was specifically rejected by this Court in *Pilot Life Ins. Co. v. Dedeaux*, *supra*.

This Court in *Great West Life v. Knudson* stated that § 1132 did not authorize a claim that would impose personal liability on a plan member for reimbursement. 535 US 214. At page 1173, App: A-8, of the *McDowell* opinion, the panel quotes a portion of the dicta from this Court in *Great West.* That language is extracted from the following:

> We note, though it is not necessary to our decision, that there may have been other means for petitioners to obtain the essentially legal relief that they seek. We express no opinion as to whether petitioners could have intervened in the state-court tort action brought by respondents or whether a direct action by petitioners against respondents asserting state-law claims such as breach of contract would have been pre-empted by ERISA. 534 US at 220.

The panel does not discuss the language following the above dicta in which this court stated:

> We need not decide these issues because, as we explained in *Mertens* '[e]ven assuming . . . that petitioners are correct about the pre-emption of previously available state court actions' or the lack of other means to obtain relief, `vague notions of a statute's "basic purpose" are none the less inadequate to overcome the words of its text regarding the *specific* issue under consideration.' 534 US at 220.

Indeed, Providence had a remedy which ERISA would not bar, but Providence chose not to pursue that remedy. Providence could have filed a subrogation claim against the third-party tortfeasors who injured the

McDowells, or intervened in the McDowells' action against the third parties.[14] If Providence had pursued one of these remedies, it would have asserted a claim against third parties, not the McDowells. What Providence could not do was assert a claim for money damages against the McDowells, who were plan members.

Six active judges and one senior judge on the Ninth Circuit dissented from the Order Denying the McDowells' Petition for a Rehearing *en banc*. Dissenting opinion, App: C-1-5. The judges, in a dissenting opinion by Judge Thomas, stated:

> [The panel's] decision marks a profound change in ERISA law and a significant deviation from the Supreme Court and Ninth Circuit precedent.
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> . . .
>
> . . . until now, our circuit has taken a consistent view of ERISA preemption in the context of common law and equitable actions between ERISA plan participants and third party insurers. If the cause of action involves an ERISA-governed relationship, the parties are confined to the remedies prescribed by ERISA. **This case marks a radical departure from our precedent, allowing an ERISA insurer to pursue independent claims for reimbursement from the plan participant. This cannot be reconciled with our precedent, nor with the Supreme Court's ERISA decisions. Indeed, the Supreme Court's recent decision in *Aetna***

[14] The McDowells filed their action in Washington. Washington Civil Rule 24 provides for intervention.

> ***Health, Inc. v. Davila*** **(citation omitted) further bolters the opposite conclusion.**
>
> . . .
>
> The impact of this decision is to provide a special exemption for one party while handcuffing the other. (Emphasis added.) Dissenting opinion, 385 F3d 1175-1177, App: C-1-5.

The dissent noted that two state appellate courts, including Oregon, had ruled that ERISA preempted state law claims for reimbursement. Those cases are: *Liberty Northwest Ins. Corp. v. Kemp*, 192 Or App 181, 193-194, 85 P3d 871 (2004) and *Jefferson-Pilot Life Ins. Co. v. Krafka*, 50 Cal App 4th 190, 57 Cal Rptr 2d 723 (1996). The dissent noted that "we are now faced with the conundrum of federal courts in Oregon and California forced to allow state remedies and state courts in those areas holding those same remedies federally preempted." Dissenting opinion, 385 F3d 1176, App: C-4.[15]

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[15] Judge Brunetti, who wrote the opinion in *McDowell* for the panel, acknowledged that the panel's decision conflicted with the Oregon and California cases. He stated that the panel agreed with states that have found no ERISA preemption, citing one case, *Behavioral Sci. Inst. v. Great-West Life*, 84 Wn App 863, 930 P2d 933 (1997). *McDowell*, 385 F3d 1173, App: A-10. However, *Behavioral Sci. Inst.*. is distinguishable because that was an action by a self-insured employer against a stop-loss reinsurer for breach of contract and bad faith. That relationship is not ERISA governed.

CONCLUSION

Providence has asserted in briefs below that it should have a remedy against a plan member for reimbursement. The McDowells do not agree. As one ERISA commentator has noted:

> The concept of reimbursement or subrogation for medical expense claims has no support in ERISA's statutory scheme. It exists because it has been unilaterally implanted in plan documents. For certain plan members, the utilization of reimbursement has the effect of completely nullifying the coverage afforded under the plan. Unfortunately, this happens mainly in situations in which the plan beneficiary has encountered serious and debilitating physical injuries.

Roger M. Barron, *Public Policy Considerations Warranting Denial of Reimbursement to ERISA Plans: It's Time to Recognize the Elephant in the Courtroom*, 55 Mercer L Rev. 596, 633 (2004).

Further, the panel's decision in *McDowell* has already caused confusion in the federal courts of appeal. Another panel of the Ninth Circuit in *Carpenters Health v. Vonderharr*, 384 F3d 667 (9th Cir 2004) held that an ERISA trustee's action to enjoin distribution of settlement proceeds to plan participants was a legal action not cognizable under ERISA, but nevertheless remanded the case for reconsideration of whether the trustee's state law claims were preempted by ERISA in light of *McDowell*. Petitioners McDowell request that this Court grant *certiorari* and dispel the confusion by holding that ERISA completely preempts a

fiduciary's state law claims for reimbursement against a plan member (as opposed to a third party tortfeasor).

Respectfully submitted,

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APPENDIX

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APPENDIX A

On October 1, 2004, the Ninth Circuit, per Judges Brunetti, Graber and Nelson issued its AMENDED OPINION in two consolidated appeals, Ninth Circuit Case No. 02-35263 and 02-35841, as follows:

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Providence Health Plan, an Oregon non-profit corporation, *Plaintiff-Appellant* v. Gary McDowell; Roselea McDowell, *Defendants-Appellees*.
Case Nos. 02-35263 and 02-35841

[385 F3d 1168 (9th Cir 2004)]

Appeal from the United States District Court
For the District of Oregon
John Jelderks, Magistrate Judge, Presiding
Thomas M. Coffin, Magistrate Judge, Presiding

Argued and Submitted
December 5, 2003 – Seattle, Washington

Filed March 24, 2004
Amended October 1, 2004

Counsel
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Gordon T. Carey, Jr.
Portland, Oregon, for the Defendants-Appellees
Before: Melvin Brunetti, Thomas G. Nelson, and
Susan P. Graber, Circuit Judges

AMENDED OPINION

BRUNETTI, Circuit Judge:

These appeals concern two actions by Providence Health Plan to recover benefits paid to its insureds, the McDowells. The first action, "*McDowell I*," was for breach of contract and was filed in state court. *McDowell I* was removed to federal court and dismissed as completely preempted under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq.* The second action, "*McDowell II*," was filed in federal court as an action for equitable relief under ERISA's civil enforcement provision, 29 U.S.C. § 1132(a). This action was also dismissed after the district court determined that Providence failed to state a claim under §1132(a).

For the following reasons, we reverse the dismissal of *McDowell I*, but affirm as to *McDowell II*.

BACKGROUND

In February of 1990, Gary McDowell applied for health coverage through SelectCare Health Plans, the health care insurance plan selected by his employer. Roselea McDowell, Gary's spouse, is covered under the same policy. The McDowells' policy was renewed every year thereafter with SelectCare and then, after SelectCare's 1997 merger with Providence, with both SelectCare and Providence. In

January of 2000, the insurance policy was issued only through Providence.

The McDowells' insurance contract with Providence contains the following reimbursement provision:

> Providence Health shall be entitled to the proceeds of any settlement, whether or not responsibility is accepted or denied by the third party for the condition, or any judgment that results in a recovery from a third party, up to the amount of benefits paid by Providence Health Plan for the condition, less a proportionate share of reasonable attorney fees, whether such benefits are paid by Providence Health Plan before or after the settlement or recovery.

On February 13, 2000, the McDowells were injured in an automobile accident. Providence paid benefits of $18,741.81 for Gary's medical care and $13,687.37 for Roselea's care.

On May 25, 2000, the McDowells each signed agreements directing their attorney to reimburse Providence for benefits paid in the event of any recovery from a third party.

The McDowells sued the driver of the vehicle that hit them as well as the driver's employer. In February of 2001, the McDowells received a settlement for approximately $500,000.

Following the settlement, Providence unsuccessfully sought reimbursement from the McDowells in the amount of

$21,727.55 under the insurance contract's reimbursement clause.

In October of 2001, Providence filed its first action against the McDowells in Linn County Circuit Court, alleging breach of contract. According to Providence, the McDowells agreed, in their insurance contract, that if they received money through any recovery action, they would reimburse Providence for the full value of benefits paid by Providence, less reasonable attorneys' fees. Providence contended that it was entitled to $21,727.55 pursuant to this provision.

The McDowells removed the contract action to federal court and filed a motion to dismiss, contending that the claim was preempted by ERISA. Providence filed a motion to remand.

On January 29, 2002, the district court denied the motion to remand and granted the McDowells' motion. The district court held that it had removal jurisdiction and that ERISA preemption barred Providence's claim.

In response to this dismissal, on April 12, 2002, Providence brought its second action in the United States District Court for the District of Oregon, this time under ERISA's civil enforcement provision, 29 U.S.C. § 1132(a). In this second case, Providence alleged that it was entitled to the equitable remedy of specific performance under § 1132(a)(3)(B) because it did not have an adequate legal remedy. Specifically, Providence sought an order mandating

the McDowells to specifically perform the reimbursement provision under the insurance contract.

On August 28, 2002, the district court dismissed this second action, concluding that Providence was in reality seeking monetary relief despite couching its request in equity.

Providence timely appealed both dismissals, and both are presently before this court.

DISCUSSION

A. Standard of Review

We review a dismissal under Federal Rule of Civil Procedure 12(b)(6) and a determination of subject matter jurisdiction de novo. *Homedics, Inc. v. Valley Forge Ins. Co.*, 315 F.3d 1135, 1138 (9th Cir. 2003); *FMC Med. Plan v. Owens*, 122 F.3d 1258, 1260 (9th Cir. 1997).

B. McDowell I

On appeal, Providence contends that the district court lacked removal jurisdiction over their breach of contract action.

[1] In order to be removable to federal court, a claim concerning a plan governed by ERISA must be preempted by ERISA and must fall within the scope of ERISA's enforcement provisions. *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 62-66 (1987); *see also*, *Toumajian v. Frailey*, 135 F.3d 648, 654 (9th Cir. 1998).

[2] ERISA's preemption provision, 29 U.S.C. § 1144(a), provides that ERISA's provisions shall generally "supersede any and all State laws insofar as they may now or

hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title." While this section suggests that the phrase "relate to" should be read broadly, the Supreme Court has recently admonished that the term is to be read practically, with an eye toward the action's actual relationship to the subject plan. *See*, *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655-56 (1995) (stating that "infinite relations cannot be the measure of preemption" in construing "relate to").

[3] Generally speaking, a common law claim "relates to" an employee benefit plan governed by ERISA "if it has a connection with or reference to such a plan." *Id.* (internal quotation marks omitted); *see also*, *Blue Cross of Cal. v. Anesthesia Care Assocs. Med. Group, Inc.*, 187 F.3d 1045, 1052 (9th Cir. 1999).

[4] In evaluating whether a common law claim has "reference to" a plan governed by ERISA, the focus is whether the claim is premised on the existence of an ERISA plan, and whether the existence of the plan is essential to the claim's survival. If so, a sufficient "reference" exists to support preemption. *California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 324-25 (1997) (citing *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 140 (1990)).

[5] In determining whether a claim has a "connection with" an employee benefit plan, courts in this circuit use a

relationship test. Specifically, the emphasis is on the genuine impact that the action has on a relationship governed by ERISA, such as the relationship between the plan and a participant. *See*, *Abraham v. Norcal Waste Sys., Inc.*, 265 F3d 811, 820-21 (9th Cir. 2001); *Blue Cross of Cal.*, 187 F3d at 1052-53.

[6] Here, the district court determined that the breach of contract action related to an ERISA plan because it sought the enforcement of a plan provision, the reimbursement provision. The district court erred in this respect because Providence's action for breach of contract does not have the requisite "connection with" or "reference to" an ERISA plan. Providence is simply attempting, through contract law, to enforce the reimbursement provision. Adjudication of its claim does not require interpreting the plan or dictate any sort of distribution of benefits. Providence has already paid ERISA benefits on behalf of the McDowells, and they are not disputing the correctness of the benefits paid. Rather, Providence claims that the McDowells have breached two promises: (a) the reimbursement provision incorporated into their ERISA plan, as it applies to monies paid to them by a non-ERISA third party, and (b) their agreement to direct their lawyer to reimburse Providence in the event of a settlement. Because this is merely a claim for reimbursement based upon the third-party settlement, it does not "relate to" the plan. *See, Blue Cross of Cal.*, 187 F3d at 1053-54 (holding action for reimbursement between insurers and medical providers

not preempted, in part because the claims did not require construction of the subject plan's terms).

[7] Also, Providence's breach of contract action fails the second requirement of removal jurisdiction because it does not fall within ERISA's civil enforcement provision, 29 U.S.C. §1132(a). As a fiduciary to the plan, Providence's only vehicle for relief in addressing violations or seeking enforcement of a plan is § 1132(a)(3). However, that section allows a fiduciary to seek only equitable relief for violation of the plan. Here, Providence is seeking ordinary damages — monetary relief — based upon contractual remedies that arise under state law. Therefore, its claim is not within ERISA's civil enforcement provisions. *Abraham*, 265 F3d at 824.

Our conclusion is further buttressed by a recent Supreme Court decision and prior decisions of this circuit dismissing ERISA actions brought by insurers for reimbursement of benefits.

[8] Most recently, in *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204, 220 (2002), the Supreme Court concluded that § 1132(a)(3) did *not* authorize a fiduciary to enforce a reimbursement provision and acknowledged that other remedies outside ERISA might be available to the fiduciary. Further, the Court left open the issue that we decide today: "whether a direct action by petitioners against respondents asserting state-law claims such as breach of contract would [be] pre-empted by ERISA." *Id.*

Previous decisions of this circuit concerning reimbursement actions by insurers are also consistent with *Great-West* and foretold our decision with regard to such actions. *See, e.g.*, *Cement Masons Health & Welfare Trust Fund for N. Cal. v. Stone*, 197 F3d 1003, 1007 (9th Cir. 1999); *Owens*, 122 F3d at 1262 & n.2. In both cases, this court held that insurance companies could not look to ERISA's provisions allowing equitable relief to obtain reimbursement from their insureds. *See Cement Masons*, 197 F3d at 1007 (recognizing implicitly, in dismissing an insurance company's ERISA claim for equitable relief, that there may be other theories outside ERISA to seek relief from the insured); *Owens*, 122 F3d at 1262 & n.2 (dismissing insurer's claims for reimbursement under § 1132(a)(3), and specifying that "FMC will have to pursue its claims under the Plans in state court if it wishes to receive the reimbursement").

We are cognizant that our decision is in conflict with the decisions of some states. *See, e.g.*, *Liberty N.W. Ins. Corp. v. Kemp*, 85 P3d 871 (Or. Ct. App. 2004) (holding that insurer's action for reimbursement is preempted by ERISA); *Jefferson-Pilot Life Ins. Co. v. Krafka*, 57 Cal. Rptr. 2d 723 (Ct. App. 1996) (holding that insurer's action for reimbursement against insured "relates to" an ERISA plan). However, in light of our precedent and the Supreme Court's recent direction in *Great-West*, we cannot agree with these courts' construction of "relate to," and instead we agree with those states that have found no ERISA preemption. *See, e.g.*,

Behavioral Scis. Inst. v. Great-West Life, 930 P.2d 933 (Wash. Ct. App. 1997) (finding no preemption of action by self-insured employer against "stop-loss" reinsurer for breach of contract and bad faith where reinsurer denied stop-loss coverage of employee's medical treatment).

[9] Because Providence's breach of contract claim is not preempted under §1144 and does not fall within the scope of § 1132(a), the district court lacked removal jurisdiction, and the case must be remanded to state court.

C. McDowell II

Following dismissal of *McDowell I*, Providence brought a suit in federal court under 29 USC § 1132(a)(3) seeking specific performance of the reimbursement provision. The district court rejected Providence's "lawyerly inventiveness" and dismissed Providence's action, stating that "Plaintiff's ERISA action, brought 'in equity' but seeking monetary relief, cannot proceed."

For the following reasons, the district court is affirmed.

1. Claim Preclusion

[10] Claim preclusion bars any "lawsuits on 'any claims that were raised *or could have been raised*' in a prior action." *Stewart v. U.S. Bancorp*, 297 F3d 953, 956 (9th Cir. 2002) (quoting *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F3d 708, 713 (9th Cir. 2001)). Claim preclusion applies if there is "'(1) an identity of claims; (2) a final judgment on the merits; and (3) identity or privity between parties.'" *Id.* (quoting *Kaiser Found. Health Plan, Inc.*, 244 F3d at 713).

[11] All three requirements are met here. First, the two actions clearly involved the same parties disputing the same contractual provision. Additionally, a finding of preemption is a final judgment on the merits. *Id.* at 956-57 (holding that the plaintiffs' ERISA claims should have been brought in the previous state court litigation that was removed and dismissed for preemption, rather than in a subsequent federal proceeding).

[12] Accordingly, this action is barred under claim preclusion.

2. Failure to State ERISA Claim

[13] ERISA authorizes fiduciaries to bring suit in federal court for "appropriate equitable relief" to remedy violations of a plan or to enforce its provisions. 29 U.S.C. § 1132(a)(3)(B). In determining whether an action for equitable relief is properly brought under ERISA, courts evaluate "the 'substance of the remedy sought . . . rather than the label placed on that remedy.'" *Westaff (USA) Inc. v. Arce*, 298 F3d 1164, 1166 (9th Cir. 2002) (quoting *Watkins v. Westinghouse Hanford Co.*, 12 F3d 1517, 1528 n.5 (9th Cir. 1993)), *cert. denied*, 537 U.S. 1111(2003).

[14] The district court was correct in concluding that Providence's claim lay outside the scope of § 1132(a)(3). While Providence terms this an action in equity for specific performance, at bottom, Providence is simply attempting to enforce a contractual obligation for repayment. This is "a classic action at law and not an equitable claim." *Id.* As has been noted by this court before in the context of § 1132,

"[a]lthough they often dance around the word, what petitioners in fact seek is . . . monetary relief for all losses their plan sustained as a result of the alleged breach of the reimbursement provision." *Id.* (internal quotation marks omitted).

[15] As noted above, the Supreme Court in Great-West recently confirmed that the damages Providence seeks are unobtainable under ERISA's enforcement provision. In reaching this conclusion, the Court explained that, regardless of the chosen label, such monetary reimbursement constitutes legal rather than equitable relief:

> The basis for petitioners' claim is . . . that petitioners are contractually entitled to some funds for benefits that they conferred. The kind of restitution that petitioners seek, therefore, is not equitable—the imposition of a constructive trust or equitable lien on particular property—but legal—the imposition of personal liability for the benefits that they conferred upon respondents.

534 U.S. at 214.

In that passage, *Great-West* squarely resolves that Providence's claim for monetary damages against the McDowells is a claim for a legal remedy, despite Providence's attempt to disguise its claim in equitable clothes. *See also Westaff*, 298 F3d at 1166-67 (declining to construe fiduciary's claim for money damages held in escrow account as a claim for equitable relief under ERISA).

CONCLUSION

[16] For the foregoing reasons, we REVERSE the district court's dismissal of *McDowell I*, and remand with instructions to remand *McDowell I* to state court, and AFFIRM the district court's dismissal of *McDowell II*.

Costs are awarded to appellant Providence Health Plan.

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APPENDIX B

On the same date, The Ninth Circuit issued an ORDER as follows:

ORDER

The Panel has voted to deny appellees' petition for rehearing. Judge Graber has voted to deny the petition for rehearing en banc, and Judges Brunetti and T.G. Nelson so recommend.

The full court has been advised of the petition for rehearing en banc and an active judge has requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are denied.

No further petitions for rehearing or petitions for rehearing en banc may be filed.

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APPENDIX C

On the same date, October 1, 2004, six active judges and Judge Noonan, filed a DISSENTING OPINION as follows:

THOMAS, Circuit Judge, with whom PREGERSON, REINHARDT, HAWKINS, MCKEOWN, and BERZON, Circuit Judges join,[1] dissenting from the denial of rehearing en banc:

I respectfully dissent from the decision of the court not to rehear this case en banc. This decision marks a profound change in ERISA law and a significant deviation from Supreme Court and Ninth Circuit precedent. It is a harsh result that will be felt in human terms by subjecting plan participants to previously preempted lawsuits while denying them the concomitant right to assert their own claims based on the same plan document or insurance policy.

The Supreme Court has observed that "ERISA is a comprehensive and reticulated statute, the product of a decade of congressional study of the Nation's private employee benefit system." *Great-West Life & Ann. Ins. Co. v. Knudson*, 534 U.S. 204, 209 (2002) (internal quotation marks and citations omitted). As part of its expansive regulation of employee benefit plans, ERISA provides for a federal cause of action for civil claims to enforce the provisions of an ERISA plan. In so providing, "Congress's

[1] JUDGE NOONAN, who cannot qualify as a dissenter to the outcome, expresses his agreement with Judge Thomas.

primary goal was to replace the patchwork quilt of state law with a uniform body of federal law and to provide litigants with access to federal courts to enforce their newly created rights." Schneider and Freedman, ERISA: *A Comprehensive Guide* (2d. Ed. 2002), §8.01, p. 8-3. Thus, courts have construed extra-statutory remedies available under ERISA quite narrowly. As the Supreme Court has stated, "ERISA's carefully crafted and detailed enforcement scheme provides strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate directly." *Id.* (Internal quotation marks and citations omitted) (emphasis in original).

Indeed, "[w]e have repeatedly emphasized that 'ERISA contains one of the broadest preemption clauses ever enacted by Congress.'" *Security Life Ins. Co. of America v. Meyling*, 146 F3d 1184, 1188 (9th Cir. 1998) (quoting *Evans v. Safeco Life Ins. Co.*, 916 F.2d 1437, 1439 (9th Cir. 1990)). ERISA "supersede[s] any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . . ." 29 U.S.C. § 1144(a). Thus, in a variety of contexts, we have held the ERISA preempts state statutory and common law actions filed by plan participants against third party insurers of ERISA plans. *See Elliot v. Fortis Benefits Ins. Co.*, 337 F3d 1138 (9th Cir. 2003); *Bast v. Prudential Ins.*, 150 F3d 1003, 1008 (9th Cir. 1998); *Greany v. Western Farm Bureau Life Ins. Co.*, 973 F3d 812, 819 (9th Cir. 1992); *Tingey v. Pixley-Richards West, Inc.*, 953 F2d 1124, 1133

(9th Cir. 1992); *Kanne v. Conn. Gen. Life Ins. Co.*, 867 F2d 489, 493-94 (9th Cir. 1988).

On the other hand, we have also held that insurers' state common law and equitable reimbursement actions against plan participants were also preempted by ERISA. *See Westaff (USA), Inc. v. Arce*, 298 F3d 1164, 1167 (9th Cir 2002); *Reynolds Metals Co. v. Ellis*, 202 F3d 1246 (9th Cir 2000); *Cement Masons Health and Welfare Trust Fund for Northern California v. Stone*, 197 F3d 1003 (9th Cir 1999); *FMC Medical Plan v. Owens*, 122 F3d 1258 (9th Cir 1997).

Thus, until now, our circuit has taken a consistent view of ERISA preemption in the context of common law and equitable actions between ERISA plan participants and third party insurers. If the cause of action involves an ERISA-governed relationship, the parties are confined to the remedies prescribed by ERISA. This case marks a radical departure from our precedent, allowing an ERISA insurer to pursue independent claims for reimbursement from the plan participant. This cannot be reconciled with our precedent, nor with the Supreme Court's decisions. Indeed, the Supreme Court's recent decision in *Aetna Health Ins. v. Davila*, 124 S. Ct. 2488 (2004) further bolsters the opposite conclusion.

This holding is also inconsistent with state courts that have applied ERISA preemption to reimbursement claims. *See, e.g., Liberty N.W. Ins. Corp. v. Kemp*, 85 P3d 871 (Or. Ct. App. 2004) (holding that insurer's action for reimbursement is preempted by ERISA); *Jefferson-Pilot Life*

Ins. Co. v. Krafka, 57 Cal. Rptr. 2d 723 (Ct. App. 1996) (holding that insurer's action for reimbursement against insured "relates to" an ERISA plan). Thus, we are now faced with the conundrum of federal courts in Oregon and California forced to allow state remedies and state courts in those areas holding those same state remedies federally preempted.

As a practical matter, the decision destroys a level playing field and creates the incongruous consequences that insurers may sue plan participants for reimbursement based on provisions in the insurance contract, but that plan participants cannot file suits or counter-claims, against insurers for breach of contract or bad faith in claim administration under the contract. Thus, insurers are now insulated from tort liability for even the most egregious acts, while permitted to sue covered employees based on the same policy or plan. Such a result is incompatible with the theory and structure of ERISA, as construed by the Supreme Court. The idea of ERISA was to provide uniform federal law and procedure regarding covered employee benefit programs. To single out one party for a special exemption is antithetical to this concept and will produce harsh and anomalous results.

If we were considering ERISA preemption on a blank slate, our course might well have been different. If ERISA had been construed to allow plan participants to enforce their state common law and statutory rights outside the confines of ERISA remedies, the panel decision would be both logical and consistent. There are good arguments as to why the

entire scope and nature of ERISA preemption ought to be reexamined. As Justice Ginsburg has observed "a series of the Court's decisions has yielded a host of situations in which persons adversely affected by ERISA-proscribed wrongdoing cannot gain make-whole relief." *Aetna Health Inc.*, 124 S. Ct. at 2502 (Ginsburg, J., concurring).

However, we are not faced with a blank slate and the breadth of ERISA preemption is well-settled. The impact of this decision is to provide a special exemption for one party while handcuffing the other. Our court should have granted rehearing en banc to rectify this error.

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APPENDIX D

On March 24, 2004, the same panel issued its original OPINION in the consolidated appeals. It is reported at 361 F3d 1243. The original Opinion differs from the Amended Opinion only in that the Amended Opinion includes one additional paragraph as follows:

We are cognizant that our decision is in conflict with the decisions of some states. *See, e.g., Liberty N.W. Ins. Corp. v. Kemp*, 85 P3d 871 (Or. Ct. App. 2004) (holding that insurer's action for reimbursement is preempted by ERISA); *Jefferson-Pilot Life Ins. Co. v. Krafka*, 57 Cal. Rptr. 2d 723 (Ct. App. 1996) (holding that insurer's action for reimbursement against insured "relates to" an ERISA plan). However, in light of our precedent and the Supreme Court's recent direction in *Great-West*, we cannot agree with these courts' construction of "relate to," and instead we agree with those states that have found no ERISA preemption. *See, e.g., Behavioral Scis. Inst. v. Great-West Life*, 930 P.2d 933 (Wash. Ct. App. 1997) (finding no preemption of action by self-insured employer against "stop-loss" reinsurer for breach of contract and bad faith where reinsurer denied stop-loss coverage of employee's medical treatment).

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APPENDIX E

The Ninth Circuit Case No. 02-35201 was an appeal from a judgment in United State District Court Case No. 01-1704-JE. On January 24, 2002, Magistrate Judge Jelderks issued his OPINION AND ORDER in the United States District Court in that case (*McDowell I*) as follows:

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Providence Health Plan, an Oregon nonprofit corporation, *Plaintiff*, v. Gary McDowell and Roselea McDowell, *Defendants*.

USDC Case No. 01-1704-JE

Opinion and Order

JELDERKS, Magistrate Judge:

Plaintiff Providence Health Plan (Providence) brings this action against defendants Gary and Roselea McDowell (the McDowells). Providence's motion to remand this matter to state court, and for an award of attorney fees, is denied. The McDowells' motion to dismiss this action with prejudice is granted.

BACKGROUND

Defendant Gary McDowell obtained Providence health care group insurance coverage through his employer. The policy also covered McDowell's wife, defendant Roselea McDowell. The McDowells were injured in an automobile

accident. Providence represents that it paid $32,429.18 for their medical care.

Paragraph 11.2 of the group insurance policy provides that, in the event of a settlement, the insured must reimburse Providence for the benefits furnished. The McDowells executed a directive to their attorney authorizing him to make the required payments in the event of a settlement. The McDowells' personal injury claims eventually did settle, and their attorney tendered a check to Providence, which tender was rejected as insufficient. The Complaint does not state the amount of the tender, but Providence contends that it "is entitled to recover $21,727.55 from defendants."

Providence brought an action in state court, claiming breach of the group insurance contract (i.e., the ERISA Plan) and also breach of a contract between the McDowells and their attorney (i.e., the directive). Providence also sought prejudgment interest, as well as attorney fees under the group insurance contract.

The McDowells removed this action to federal court, citing ERISA preemption, and then moved to dismiss the action. Providence responded that this is not an ERISA case, or at least it is not completely preempted, and then moved to remand the case to state court.

DISCUSSION

In *Great-West Life & Annuity Ins. Co. v. Knudson*, _____US _____, 2002 WL 15399 (Jan 8, 2002), a case almost precisely on point, the United States Supreme Court held (5-4) that § 502(a)(3) of ERISA does not authorize a

claim for reimbursement under these circumstances. It is, in essence, a claim for damages, and ERISA does not authorize a claim for damages by a person in the position of Providence. ERISA does authorize equitable relief, but the Court declined to characterize a claim for contractual reimbursement as a claim for equitable relief. With that issue settled, the remaining questions before this court are (1) whether ERISA, though not furnishing a remedy, nevertheless preempts a state law contract claim for reimbursement, and (2) whether this court has subject matter jurisdiction to decide that question.

"It is with great trepidation that we tread into the field of ERISA preemption . . . [a subject] that has bedeviled the Supreme Court." *Dishman v. Unum Life Ins. Co. of America*, 269 F3d 974, 980 (9th Cir 2001). ERISA "supersede[s] any and all state laws insofar as they . . . relate to any employee benefit plan." 29 USC § 1144(a). For purposes of § 1144(a), the term "state laws" includes state law claims for breach of contract.

Providence seeks to enforce the terms of the employee benefit plan. Whatever the outer limits of ERISA preemption, I see no way to avoid the conclusion that an action to enforce the provisions of an employee benefit plan is a claim relating to an employee benefit plan.[1] It is

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[1] I reject Providence's contention that the "directive" is an independent contract that may be enforced without reference to the employee benefit plan. Providence is not a signatory to the directive (which is between the McDowells and their attorney), nor was there new consideration. Providence was already obligated to furnish health care benefits under the

regrettable that, in the wake of *Knudson*, Providence may be left without a remedy, but that does not alter this conclusion. *See, e.g., Bast v. Prudential Ins. Co. of America*, 150 F3d 1003, 1009-10 (9th Cir 1998) (claim for bad faith delay in providing health care benefits, which resulted in the death of the insured, is preempted by ERISA, notwithstanding that it leaves the plaintiff with no remedy), *cert. denied*, 528 US 870 (1999).

I am not persuaded by Providence's arguments that the state law claim is a state law regulating insurance that is preserved by ERISA's savings clause, or that ERISA preemption applies to .claims brought by beneficiaries against the Plan, but not vice versa, or that ERISA preemption does not apply because Providence is suing in its capacity as an insurer and not as a fiduciary.

Providence also argues that, even if its state law claims are preempted, they are not "completely preempted,"hence this court lacks subject matter jurisdiction. I disagree.

Ordinarily, a "federal defense" is insufficient to confer federal question jurisdiction. *ARCO Environmental Remediation, LLC v. Montana Dept of Health & Env. Quality*, 213 F3d 1108, 1113 (9th Cir 2000). "[A] case may not be removed to federal court on the basis of a federal defense, . . . even if the defense is anticipated in the plaintiff's complaint, and even if both parties admit that the defense is

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existing contract, and the McDowells were already obligated to reimburse Providence.

the only question truly at issue in the case." *Franchise Tax Bd. of California v. Construction Laborers Vacation Trust for S. California*, 463 US 1, 14 (1983). "[T]he existence of federal jurisdiction depends solely on the plaintiff's claims for relief and not on anticipated defenses to those claims." *ARCO*, 213 F3d at 1113.

A narrow exception to the general rule is the doctrine of "complete preemption," by which Congress may so completely preempt a particular field that any complaint raising claims in that field is necessarily federal in nature. ERISA is such a statute. *See, Metropolitan Life Ins. Co. v. Taylor*, 481 US 58, 65-66 (1987). "ERISA's preemptive provision is so complete that an ERISA preemption defense provides a sufficient basis for removal . . . notwithstanding the traditional limitation imposed by the 'well-pleaded complaint' rule." *Geweke Ford v. St. Joseph's Omni Preferred Care Inc.*, 130 F3d 1355, 1358 (9th Cir 1997) (citations and quotation marks omitted). Either Providence has an ERISA claim, or else it has no claim. There is no room for a state law claim in this circumstance.

The claims here are within the general scope of ERISA's enforcement procedures. The fact that the remedy the plaintiff seeks is unavailable, or that the plaintiff cannot prevail on the facts of the particular case, does not mean that the court lacks subject matter jurisdiction. *See Cement Masons Health and Welfare Trust Fund for Northern California v. Stone*, 197 F3d 1003, 1007-08 (9th Cir 1999)

(on similar facts, dismissing on the merits rather than lack of jurisdiction).

In *FMC Medical Plan v. Owens*, 122 F3d 1258, 1262 (9th Cir 1997), a Ninth Circuit panel did state that because "FMC's claim is not cognizable under section 1132(a) (3) . . . the district court was without subject matter jurisdiction to entertain this claim." However, the Ninth Circuit subsequently disavowed that statement in *Cement Masons*, 179 F3d at 1007-08, and the latter analysis appears to be the better reasoned.

There also is dictum in a footnote in *FMC Medical Plan*, 122 F3d at 1262, n 2, which suggests that the insurer can simply go to state court. ("FMC will have to pursue its claims under the Plans in state court if it wishes to receive the reimbursement it is allegedly owed by Owens.") However, this was part of the paragraph that has since been disavowed, and is dictum as well. In its reply brief, Providence suggests that the US Supreme Court endorsed this dictum in *Knudson*, but a careful reading of the case reveals that the Supreme Court simply declined to express an opinion on a question not properly before the Court. The Supreme Court did not preclude the possibility that there might be some other procedural mechanism by which an insurer could protect its rights, but Providence has not demonstrated that the present action is such a mechanism.

As a practical matter, a remand would be pointless here since the state court would have little choice but to conclude that all of Providence's claims are preempted. This

is not a case in which federal preemption of one claim is cited as justification for removing the entire case to federal court, and something would remain for the state court to try even if it concluded that a part of the case was preempted. Either this court dismisses the action, or else the state court will have to do it, but the end result will be the same unless Congress amends the law and makes that amendment applicable to all pending cases. Although I am sympathetic to Providence's position, the law (as interpreted by the United States Supreme Court and the Ninth Circuit Court of Appeals) permits no other result here.

Having concluded that this action was properly removed, I deny Providence's request for an award of attorney fees pursuant to 28 USC §1447(c).

CONCLUSION

Providence's motion (#6) to remand is DENIED, as is Providence's request for an award of attorney fees. The McDowells' motion (#4) to dismiss is GRANTED, and the action is dismissed with prejudice.

DATED this 29th day of January, 2002.

/s/ John Jelderks

US Magistrate Judge

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APPENDIX F

The Ninth Circuit Case No. 02-35841 is an appeal from a judgment in the United States District Court Case No. 02-6110-TC. On August 28, 2002, Thomas M. Coffin, Magistrate Judge, issued his ORDER in the United States District Court in that case as follows:

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Providence Health Plan, an Oregon corporation, *Plaintiff*, v. Gary and Roselea McDowell *Defendants*.

ORDER

COFFIN, Magistrate Judge:

This action represents plaintiff 's second attempt to obtain reimbursement from defendants of funds they claim are owed to them related to medical expenses stemming from an automobile accident. Judge Jelderks of this court has previously dismissed an action at law seeking damages in the amount in controversy, finding that the nature of the action was impermissible due to ERISA preemption. Plaintiffs have now filed a second action, this time characterizing it as a suit in equity brought under ERISA. Presently before the court are defendants' motion to dismiss (#5) and plaintiff's motion for summary judgment (#7).

STANDARD OF REVIEW

Pursuant to Fed. R. Civ. P. 12(b), a complaint may be dismissed on the basis of the pleadings if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *Tanner v. Heise*, 879 F2d 572, 576 (9th Cir. 1989) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). In making this determination upon a motion to dismiss, this court accepts all allegations of material fact as true and construes the allegations in the light most favorable to the nonmoving party. *Id.*

DISCUSSION

The facts of this case do not affect the court's analysis and were reported in Judge Jelderk's earlier opinion, so they need not be repeated in detail here. Suffice it to say that defendants were insured beneficiaries of a health care plan offered by plaintiff when they were involved in an automobile accident. Plaintiff paid certain benefits to defendants, but after defendants obtained a recovery from the other party involved in the accident, plaintiff asserted that it was entitled to a certain amount of the recovery by way of reimbursement, pursuant to the insurance agreement.[1] After rejecting an offer of compromise, plaintiffs filed their first suit against defendants. That action, a state law action removed to federal court, was dismissed because the court

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[1] Plaintiff also had defendants sign a directive to their attorney that the attorney would earmark recovered funds for payment to plaintiff.

found that such actions were preempted by ERISA and ERISA did not provide the remedy sought by plaintiff.[2]

In this second action, plaintiff has specifically invoked ERISA, and now characterizes this suit as equitable in nature, pursuant to Section 502(a)(3) of ERISA.[3] Instead of seeking "money damages", plaintiff purportedly seeks an order requiring specific performance and an injunction, to the effect that defendants would be required to pay the amount in controversy to plaintiff.

This is not the first time such "lawyerly inventiveness" has been seen in this sort of case. Indeed, just last term, the United States Supreme Court heard the case of *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204, 122 S. Ct. 708 (2002), which involved very similar facts. In *Great-West*, the defendant had received benefits from the plaintiff insurance company after sustaining injuries in an automobile accident. The insurance agreement at issue had a reimbursement provision that entitled plaintiff to recover any payment for benefits paid to the defendant from a third party, not to exceed the amount paid by the plaintiff. Ultimately, the defendant did recover for her injuries from a third party, and Great-West thereafter filed a action in U.S.

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[2]2 That opinion is currently being appealed to the Ninth Circuit.

[3]3 Codified at 29 USC § 1132(a)(3), and stating that: "A civil action may be brought by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subshapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter of the terms of the plan[.]

District Court, seeking injunctive and declaratory relief under Section 502 (a) (3) of ERISA.

The Court, in a thorough analysis, identified the suit as being an action at law disguised as an action in equity:

> Here, petitioners seek, in essence, to impose personal liability on respondents for a contractual obligation to pay money - relief that was not typically available in equity. "A claim for money due and owing under a contract is `quintessentially an action at law.'" *Wal-Mart Stores, Inc. v. Wells*, 213 F3d 398, 401 (7th Cir. 2000) (Posner, J.). "Almost invariably . . . suits seeking (whether by judgment, injunction, or declaration) to compel the defendant to pay a sum of money to the plaintiff are suits for 'money damages,' as that phrase has traditionally been applied, since they seek no more than compensation for loss resulting from the defendant's breach of legal duty." *Bowen v. Massachusetts*, 487 US 879, 918-919 (1988) (Scalia, J., dissenting). And "[m]oney damages are, of course, the classic form of *legal* relief." *Mertens [v. Hewitt Associates*, 508 US 248 (1993)] at 255. Nevertheless, petitioners, along with their *amicus* the United States, struggle to characterize the relief sought as "equitable" under the standard set in *Mertens*. We are not persuaded.

Great-West, 122 S.Ct. at 712-713. The Court, after evaluating the various theories under which the plaintiff could be seen as proceeding in equity, discarded each one as disingenuous or otherwise inappropriate. The Court concluded:

> Congress authorized "a participant or beneficiary" to bring a civil action "to enforce his rights under the terms of the plan," without reference to whether the relief sought is legal or equitable. 29 USC § 1132(a)(1)(B). But Congress did not extend the same authorization to fiduciaries. Rather, § 502(a)(3), by its terms, only allows for *equitable* relief. We will not attempt to adjust the "carefully crafted and detailed enforcement scheme" embodied in the text that Congress has adopted. *Mertens*, *supra*, at 254. Because petitioners are seeking legal relief--the imposition of personal liability on respondents for a contractual obligation to pay money--§ 502(a)(3) does not authorize this action.

Id. at 718-719.

Great-West appears to be dispositive; the underlying facts are very similar to those in the instant case, and the legal theory used by Great-West is essentially identical to that proffered by plaintiff here. Plaintiff attempts to maneuver its case outside of *Great-West*'s scope, however, by arguing that in *Great-West* the Court was not faced with a case where the plaintiff has already been denied a remedy at law.[4] The linchpin of plaintiff's argument is based on a brief passage in the Court's opinion:

> We note, though it is not necessary to our decision, that there may have been other

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[4]4 Plaintiff argues, and the court assumes, *arguendo*, that as a result of Judge Jelderk's opinion, it has been left with no available remedy at law.

> means for petitioners to obtain the essentially legal relief that they seek. We express no opinion as to whether petitioners could have intervened in the state-court tort action brought by respondents or whether a direct action by petitioners against respondents asserting state-law claims such as breach of contract would have been pre-empted by ERISA. Nor do we decide whether petitioners could have obtained equitable relief against respondents' attorney and the trustee of the Special Needs Trust, since petitioners did not appeal the District Court's denial of their motion to amend their complaint to add these individuals as codefendants.

Great-West, 122 S. Ct. at 718. Plaintiff places emphasis on the clause "there may have been other means for petitioners to obtain the essentially legal relief that they seek." Thus, plaintiff argues, the Court was not faced with a situation in which traditional equitable relief would be warranted, because plaintiff Great-West may have had a remedy at law. However, this ignores the earlier clause "though it is not necessary to our decision." The Court did not base its opinion on the idea that Great-West may have had a remedy at law, and that therefore equity was unwarranted. If it had, the possibility of a remedy at law would have been central to its decision, as opposed to "not necessary." Rather, the Court was quite clearly stating that whether plaintiff had a separate remedy at law was immaterial -- Congress had not intended to allow fiduciaries to bring the type of "money damages" actions that Great-West had brought, and whether

characterized as an action at law or in equity, such actions could not stand.

Great-West controls this court's decision. Plaintiff's ERISA action, brought "in equity" but seeking monetary relief, cannot proceed. As such, defendants' motion to dismiss must be granted.

As did Judge Jelderks, the court notes the difficult situation which plaintiff and those similarly situated now face. Actions at law are preempted by the existence of ERISA, and actions in equity seeking money damages for reimbursement are foreclosed by ERISA's terms. It may be that in situations like the one presented here, health insurers will have to seek recovery of its expenses directly from the third party, as do companies offering other types of insurance, by subrogating the insured's claims. For the moment, however, as it relates to the claim presently before the court, the parties are urged to seek consolidation of this case with the earlier action presently on appeal, to enable the appellate courts to consider the issues presented as a whole.

CONCLUSION

Based on the controlling case of *Great-West Life & Annuity Insurance Co. v. Knudson*, plaintiff's case cannot stand. Defendants' motion to dismiss (#5) is granted. Plaintiff's motion for summary judgment (#7) is denied as moot.

DATED this 28th of August, 2002.

/s/ Thomas M. Coffin
US Magistrate Judge

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APPENDIX G

On October 18, 2001, plaintiff Providence Health Plan filed a COMPLAINT in Linn County Circuit Court, Case No. 01-2087, in McDowell I. Defendants removed the COMPLAINT to the United States District Court for the District of Oregon in Case No. 01-1704-JE. The COMPLAINT read as follows:

IN THE CIRCUIT COURT
OF THE STATE OF OREGON
FOR THE COUNTY OF LINN

Providence Health Plan, an Oregon nonprofit corporation, *Plaintiff*, v. Gary McDowell and Roselea McDowell, *Defendants*.

USDC Case No. 01-1704-JE

1.

Providence is an Oregon nonprofit corporation licensed in Oregon as a health care service contractor, authorized to provide health coverage to its members pursuant to contracts entered into with them, in some cases through group plans maintained by the members' employers.

2.

Defendants Gary McDowell and Roselea McDowell, his wife, are individuals residing at 35195 S.E. Cortez Place, Albany, Oregon 97321, in Linn County, Oregon.

3.

On February 27, 1990, Gary McDowell applied for health coverage with Providence's predecessor in interest by merger, SelectCare Health Plans, through his employer Teledyne Wah Chang; a true copy of his application is attached as Exhibit I to this complaint and incorporated by reference. On the same application, Roselea McDowell applied for coverage as Gary McDowell's spouse. Both Gary McDowell and Roselea McDowell renewed their coverage each subsequent year with Select Care Health Plans and with Providence, including calendar year 2000. As of January 1, 2000, Providence issued a health care service contract to Teledyne Wah Chang's successor Oremet Wah Chang, under which Gary McDowell and Roselea McDowell were provided health coverage, subject to all its terms ("the Group Contract"); a true copy of the Group Contract is attached as Exhibit 2 to this complaint and incorporated by reference.

4.

On or about February 13, 2000, Gary and Roselea McDowell were injured in an automobile accident on account of being struck by an automobile driven by one Nikolas Peterson. As a result of the injuries, Providence paid a total of $18,741.81 for Gary McDowell's medical care, and a total of $13,687.37 for Roselea McDowell's care.

5.

In connection with their injuries, Gary and Roselea McDowell brought claims in February 2001 in the Washington Superior Court for Pierce County, No. 01-2-09210-9, against Nikolas Peterson and his employer Statewide, Inc. for negligence, asserting damages in an amount over $820,000 ("the Third-Party Action"). In connection with the Third-Party Action, defendants have recovered an amount presently unknown to Providence but believed to be approximately $500,000.

6.

Under the terms of paragraph 11.2 of the Group Contract, defendants are obligated to repay Providence from any recovery such as that from the Third-Party Action, in an amount equal to the full value of the benefits provided, less a proportionate share of reasonable attorneys' fees. On or about May 25, 2000, defendants signed and their counsel Gordon T. Carey, Jr. accepted Providence's Agreement of Counsel for Reimbursement to Providence from Third Party Recovery, true copies of which are attached as Exhibits 3 and 4 to this complaint and incorporated by reference ("the Trust Agreements"). Under the Trust Agreements, defendants irrevocably directed their counsel to reimburse Providence "directly and promptly" from any settlement or recovery in the Third Party Action "a sum equal to the total amount of the benefits paid ... by Providence ... , less a proportionate share of the reasonable costs and attorney fees incurred in obtaining the recovery."

7.

Defendants have refused to comply with the Group Agreement and with the Trust Agreements, which require payment to Providence of $21,727.55, given industry custom that Providence's proportionate share of collection expenses equals one-third of the amount Providence paid on defendants' behalf. Under cover of a letter from Mr. Carey dated September 24, 2001, defendants tendered a portion of this amount "in full payment of any claim," indicating that Providence would have to file suit if it wanted otherwise to enforce its contractual rights.

8.

Providence is entitled to recover $21,727.55 from defendants, and has been damaged in that amount by defendants' refusal to comply with their obligations under the Group Agreement and under the Trust Agreements.

SECOND CLAIM FOR RELIEF

(Prejudgment Interest)

9.

Providence incorporates paragraphs 1 through 8 above.

10.

Defendants' obligations to repay Providence under the Group Agreement and under the Trust Agreements are liquidated and therefore subject to an award of prejudgment interest at the 9% statutory rate from the date defendants received their settlement.

THIRD CLAIM FOR RELIEF

(Attorneys' Fees)

11.

Providence incorporates paragraphs 1 through 10 above.

12.

Defendants are obligated under paragraph 11.8 of the Group Contract to reimburse Providence for the reasonable attorney fees incurred by Providence in enforcing the provisions of the Group Contract.

PRAYER FOR RELIEF

WHEREFORE Providence asks that the Court:

1. Award Providence judgment for damages for breach of the Group Agreement against defendants, jointly and severally, in the amount of $21,727.55, plus prejudgment interest, or such other amount as may be proven at trial;

2. Award Providence its taxable costs, expenses, and reasonable attorneys' fees; and

3. Award Providence such other relief as may be just and equitable in the circumstances.

DATED this 17th of October, 2001.

/s/ Arden J. Olson
Of Attorneys for Providence

APPENDIX H

On April 12, 2002, plaintiff Providence Health Plan, filed a COMPLAINT in the United States District Court for the District of Oregon, Case No. 02-6110 in McDowell II as follows:

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Providence Health Plan, an Oregon corporation, *Plaintiff*, v. Gary and Roselea McDowell *Defendants*.

PARTIES

1. Providence is an Oregon nonprofit corporation licensed in Oregon as a health care service contractor, authorized to provide health coverage to its members pursuant to contracts entered into with them, in some cases through group plans maintained by the members' employers.

2. Defendants Gary McDowell and Roselea McDowell, his wife, are individuals residing at 35195 S.E. Cortez Place, Albany, Oregon 97321, in Linn County, Oregon.

JURISDICTION AND VENUE

3. The matter in controversy is governed by the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et seq ("ERISA"). This Court has jurisdiction pursuant to 29 U.S.C. §I132(a)(3), which authorizes fiduciaries under ERISA to bring suit for appropriate equitable relief.

4. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(a).

THE HEALTH PLAN

5. On February 27, 1990, Gary McDowell applied for health coverage with Providence's predecessor in interest by merger, SelectCare Health Plans, through his employer Teledyne Wah Chang; a true copy of his application is attached as Exhibit 1 to this complaint and incorporated by reference. On the same application, Roselea McDowell applied for coverage as Gary McDowell's spouse. Both Gary McDowell and Roselea McDowell renewed their coverage each subsequent year with SelectCare Health Plans and with Providence, including calendar year 2000. As of January 1, 2000, Providence issued a health care service contract to Teledyne Wah Chang's successor Oremet Wah Chang, under which Gary McDowell and Roselea McDowell were provided health coverage, subject to all its terms ("the Plan"); a true copy of the Plan is attached as Exhibit 2 to this complaint and incorporated by reference. With respect to the Plan, Providence is a "fiduciary" as that term is used in ERISA.

THE THIRD PARTY RECOVERY

6. On or about February 13, 2000, Gary and Roselea McDowell were injured in an automobile accident on account of being struck by an automobile driven by one Nikolas Peterson. As a result of the injuries, Providence paid a total of $18,741.81 for Gary McDowell's medical care, and a total of $13,687.37 for Roselea McDowell's care.

7. In connection with their injuries, Gary and Roselea McDowell brought claims in February 2001 in the Washington Superior Court for Pierce County, No. 01-2-09210-9, against Nikolas Peterson and his employer Statewide, Inc. for negligence, asserting damages in an amount over $820,000 ("the Third-Party Action"). In connection with the Third-Party Action, defendants have recovered an amount presently unknown to Providence but believed to be approximately $500,000.

8. Under the terms of paragraph 11.2 of the Plan, defendants are obligated to repay Providence from any recovery such as that from the Third-Party Action, in an amount equal to the full value of the benefits provided, less a proportionate share of reasonable attorneys' fees. On or about May 25, 2000, defendants signed and their counsel Gordon T. Carey, Jr. accepted Providence's Agreement of Counsel for Reimbursement to Providence from Third Party Recovery, true copies of which are attached as Exhibits 3 and 4 to this complaint and incorporated by reference ("the Trust Agreements"). Under the Trust Agreements, defendants irrevocably directed their counsel to reimburse Providence "directly and promptly" from any settlement or recovery in the Third Party Action "a sum equal to the total amount of the benefits paid ... by Providence ... , less a proportionate share of the reasonable costs and attorney fees incurred in obtaining the recovery."

9. Defendants have refused to comply with the Plan and with the Trust Agreements, which require payment to

Providence of $21,727.55, given industry custom that Providence's proportionate share of collection expenses equals one-third of the amount Providence paid on defendants' behalf. Under cover of a letter from Mr. Carey dated September 24, 2001, defendants tendered a portion of this amount "in full payment of any claim," indicating that Providence would have to file suit if it wanted otherwise to enforce its contractual rights.

10. Providence is entitled under the terms of the Plan to recover $21,727.55 from defendants, and has been damaged in that amount by defendants' refusal to comply with their obligations under the Plan and under the Trust Agreements.

11. Providence brought suit under its contract in Linn County Circuit Court on October 18, 2001, in *Providence Health Plan v. McDowell*, No. 012087 (Linn County, Oregon). On November 26, 2001, defendants removed that case to the United States District Court for the District of Oregon, in *Providence Health Plan v. McDowell*, No. 01-CV-1704- JE (D. Or.). Defendants moved to dismiss for failure to state a claim upon which relief may be granted, alleging that ERISA preempted Providence's state law contract claim, and Providence moved to remand the case to the Linn County Circuit Court on the ground that ERISA provided no subject matter jurisdiction over that state law contract claim. The motions were submitted to Magistrate John Jelderks pursuant to consents, and on January 29, 2002, the court issued its decision, a copy of which is attached as

Exhibit 5 to this complaint and incorporated by reference ("the Preemption Ruling"). In summary, the Preemption Ruling found that:

(a) An action to enforce the provisions of an employee welfare benefit plan is a claim "related to" that plan for purposes of ERISA preemption;

(b) Providence's state law claim was therefore completely pre empted by ERISA;

(c) Providence's state law claim was not based on a state law "which regulates insurance" so as to be saved from preemption under 29 U.S.C. §1144(b)(2)(A);

(d) Removal to this court was therefore proper and remand should be denied; and

(e) Providence, therefore, "may be left without a remedy" for the defendants' breach of contract.

12. Judgment was entered under the Preemption Ruling on January 29, 2002, and thereafter timely appealed to the United States Court of Appeals for the Ninth Circuit, where the appeal is now pending.

FIRST CLAIM FOR RELIEF

(Injunction requiring Specific Performance of ERISA Plan)

13. Plaintiff realleges paragraphs 1 though 12 above.

14. Specific performance may be "appropriate equitable relief" under 29 U.S.C. §1132(a)(3)(B).

15. An injunction requiring specific performance of an otherwise valid contract is appropriate when plaintiff has substantially performed its part of the contract, defendant is able to perform, and plaintiff has no adequate remedy at law.

16. The Plan is a valid contract.

17. Providence has substantially performed its obligations under the Plan.

18. Defendants are able to perform their obligations under the Plan.

19. Under the terms of the Preemption Ruling, Providence has no adequate remedy at law under state law, because this court has ruled that any state law contract remedy otherwise available to Providence has been preempted by ERISA. Under *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 122 S. Ct. 708, 2002 WL 15399 (2002), Providence has no adequate remedy at law under federal law, because only "equitable remedies" are available to it under the terms of 29 U.S.C. § 1132(a)(3). Providence has, therefore, no adequate remedy at law under either federal or state law, and will be irreparably harmed absent an injunction from this court requiring defendants to perform their obligations under the Plan.

20. Providence is therefore entitled to an injunction under 29 U.S.C. § 1132(a)(3) requiring defendants to perform their reimbursement obligations under the Plan.

SECOND CLAIM FOR RELIEF

(Prejudgment Interest)

21. Plaintiff realleges paragraphs 1 though 20 above.

22. Defendants' obligations to repay Providence under the Plan and under the Trust Agreements are liquidated and therefore subject to an award of prejudgment interest at the rate determined under 28 U.S.C. §1961 from the date defendants received their settlement.

THIRD CLAIM FOR RELIEF

(Attorneys' Fees)

23. Plaintiff realleges paragraphs 1 though 22 above.

24. Providence is entitled to an award of its reasonable attorneys' fees and costs under 29 U.S.C. § 1132(g).

PRAYER FOR RELIEF

WHEREFORE, Providence requests that this Court:

1. Issue an injunction requiring defendants to pay Providence the amount of $21,727.55, plus statutory prejudgment interest, or such other amount as may be proven at trial;
2. Award Providence its taxable costs, expenses, and reasonable attorneys' fees; and
3. Award Providence such other relief as may be just and equitable in the circumstances.

DATED this 12th of April, 2002.

/s/ Arden J. Olson
Of Attorneys for Providence